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No. 80-1063

IN THE
Supreme Court of the United States

October Term 1980

JAMES A. MONTGOMERY,
on behalf of himself and
all others similarly situated,

Petitioner,

vs.

AMERICAN AIRLINES, INC.,
a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LLOYD EDWARD TOOKS
Attorney at Law
225 Broadway, 16th Floor
San Diego, California 92101
Telephone: (714) 232-2931

Attorney for Petitioner

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

QUESTIONS PRESENTED

1. Does an air passenger have an implied private cause of action against the air carrier, under § 404(b) of the Federal Aviation Act of 1958, for unjust discrimination suffered by the air passenger in connection with air transportation?

2. Does the application of the doctrine of primary jurisdiction relieve the federal court of jurisdiction and require the dismissal of the action?

3. Is the doctrine of primary jursidiction applicable where the administrative agency has previously decided the issue in question?

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OPINIONS BELOW

Neither the Opinion of the Court of Appeals for the Ninth Circuit nor the Memorandum Decision On Cross Motions For Summary Judgment of the District Court for the Southern District of California is, at this time, officially reported. Both the Opinion and the Memorandum Decision On Cross Motions For Summary Judgment are set forth in the appendix.

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit was entered on July 28, 1980. In response to a timely petition for rehearing an Order Amending Opinion and Denying Petition For Rehearing was entered on October 17, 1980; and this petition for certiorari was filed within ninety (90) days after the entry of said Order. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Federal Aviation Act of 1958 (49 USC § 1301, et seq.) provide:

Section 403(b)(1), 49 USC § 1373(b)(1):

> "No air carrier or foreign air carrier or any ticket agent shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in then currently effective tariffs of such air carrier or foreign air carrier; and no air carrier or foreign air carrier or ticket agent shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or

charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs except those specified therein. Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees. . . ."

Section 404(b), 49 USC § 1374(b):

"No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The pertinent portion of the regulations promulgated by the Civil Aeronautics Board provides:

14 CFR 223.2(b)(1):

"Any carrier engaged in overseas or foreign air transportation may provide free or reduced-rate overseas or foreign air transportation to: (1) Directors, officers, and employees and members of their immediate families, of any affiliate of such carrier, the name of which affiliate currently is included in the list of affiliates filed by such carrier pursuant to § 223.7. . . ."

STATEMENT OF CASE

On September 15, 1977, James A. Montgomery (hereinafter referred to as "Petitioner") filed a class action complaint against American Airlines, Inc. (hereinafter referred to as "Respondent") in the United States District Court for the Southern District of California. In substance, the complaint states that Respondent unjustly discriminated against Petitioner and the class of persons Petitioner represents by granting unauthorized free and reduced-rate *domestic* air transportation to officers, directors and employees of certain of Respondent's subsidiary corporations. Based upon Respondent's conduct in this regard, the complaint charges a violation of the Federal Aviation Act of 1958 (hereinafter referred to as the "Act"), and specifically § 404(b) (49 USC § 1374 (b)) thereof.

Since the complaint charged a violation of an act of Congress that regulates commerce (the Act), federal jurisdiction of the District Court was invoked pursuant to 28 USC § 1337.

Petitioner is a citizen of the United States and, like the members of the class Petitioner represents in this action, he was a full-fare-paying passenger on Respondent's aircraft within two (2) years preceding the filing of the complaint in this action. Respondent is an air carrier subject to the proscriptions and provisions of the Act. Respondent has a subsidiary corporation named Flagship International, Inc. Respondent grants free or reduced rate *domestic* air transportation to some of the officers and directors of Flagship International.

Flagship International has a division named Sky Chefs. Respondent grants free or reduced-rate *domestic* air transportation to all of the employees of Sky Chefs. Americana Hotels, Inc. is a corporation, and a wholly-owned subsidiary of Flagship International. Respondent grants free or reduced-rate *domestic* air transportation to those employees of Americana Hotels who are also officers and directors of Flagship International.

Respondent also grants free or reduced-rate *domestic* air transportation to four officers of Round Rock Lime Corporation, a wholly-owned subsidiary of AA Development Corporation, which is a wholly-owned subsidiary of Respondent.

Pursuant to § 403(b)(1) of the Act (49 USC § 1373(b)(1)) Respondent, as an air carrier, is authorized to grant free and reduced-rate air transportation to Respondent's officers, directors and employees. As stated in that section:

> "Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board (CAB) may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to *their* directors, officers, and employees . . ." (emphasis added).

Section 403(b)(1) also permits an air carrier to grant free or reduced-rate air transportation "in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board (CAB) may by regulation prescribe." The pertinent regulations promulgated by the CAB in this regard are found in 14 CFR § 223.1 and § 223.2 (Appendix, I-1 and I-2). That portion of 14 CFR § 223.2 relevant to this matter provides:

> "Any carrier engaged in overseas or foreign air transportation may provide free or reduced-rate *overseas* or *foreign* air transportation to: (1) Directors, officers, and employees and members of their immediate families, of any affiliate of such carrier, the name of which affiliate currently is included in the list of affiliates filed by such carrier pursuant to § 223.7;" (14 CFR § 223.2(b)(1) (emphasis added).

The term "affiliate" is defined in 14 CFR § 223.1, and the definition implicitly includes corporate subsidiaries of air carriers.

When read together, the provisions of § 403(b)(1) and 14 CFR § 223.2 cited above authorize and permit the following:

> 1. The granting of free and reduced-rate *domestic, overseas* and *foreign* air transportation to the officers, directors and employees of *air carriers*;
> 2. The granting of free and reduced-rate *overseas* and *foreign* air transportation to officers, directors and employees of *affiliates of air carriers.*

An air carrier is not authorized or permitted to grant free or reduced-rate *domestic* air transportation to officers, directors or employees of *affiliates.*

The aforementioned limitation on the authority of an air carrier to grant free or reduced-rate *domestic* air transportation was confirmed by the General Counsel of the Civil Aeronautics Board (hereinafter referred to as "CAB") in an opinion letter. See Appendix, E-1 and E-2. The General Counsel opined:

> "Neither the Act nor the Board's regulations authorize free or reduced-rate interstate transportation for the officers, directors, or employees of affiliates of air carriers. Section 403(b) of the Act limits free and reduced rates in interstate air transportation to certain named classes of persons, including employees of air carriers, but not employees of air carrier affiliates. . . .
>
> It mat be noted that section 403(b) authorizes the Board to expand the scope of free and reduced-rate transportation in overseas and foreign air transportation and section 223.2(b)(1) of the Board's Economic Regulations (14 CFR § 223.2(b)(1)) permits carriers to provide free and reduced-rate overseas and foreign air transportation to employees of its affiliates. As indicated above, however, it does not authorize free or reduced-rate *interstate* transportation for such persons" (emphasis original).

In the opinion letter the General Counsel of the CAB also referred to one of the CAB orders that supports the opinion. See Appendix, F-1 through F-3. The order was issued in connection with an application by World Airways, Inc. which, in part, requested permission to provide free or reduced-rate *domestic* air transportation to the employees of a wholly-owned subsidiary of World Airways, Inc. -- World Air Center. In denying the request, the CAB stated:

> "Section 403(b) of the Act does not provide for the issuance or interchange of passes for free or reduced-rate transportation for employees of affiliates of air carriers and the Board has not extended the privilege to such persons by exemption. However, pursuant to the provision of section 403(b) which authorizes the Board to issue regulations permitting free or reduced-rate transportation to other persons in overseas and foreign air transportation, the Board has adopted section 223.2(b)(1) of the Regulations which permits a scheduled carrier to provide free or reduced-rate overseas or foreign air transportation to employees of its own affiliates. *It does not authorize free or reduced-rate interstate transportation for such persons*, nor does it permit interchange of passes for transportation by carriers other than the affiliated carrier" (emphasis added).

The CAB order continued:

> "World has not presented any persuasive reason why it should be authorized to issue or interchange passes for interstate transportation to the employees of its affiliate. As indicated previously, such authority is not now granted to scheduled air carriers. The fact that World has chosen for its own benefit to organize a separate corporate entity for purposes of providing maintenance to World does not warrant expansion of the scope of free and reduced-rate transportation privileges."

On or about August 10, 1976, Mr. James W. Greene, Chief of the Tariffs Section of the CAB, wrote to Respondent and, among other things, asked Respondent to furnish the CAB with the "basis for including Sky Chefs in the definition of *Company* in your free and reduced-rate manual." See Appendix, G-1. Mr. Greene also admonished Respondent that "if Sky Chefs qualifies only as an 'affiliate' of American then pass privileges for Sky Chefs personnel must be restricted as required by Part 223.2(b)(1)." Respondent responded to Mr. Greene's letter, and on or about September 21, 1976, Mr. Greene again wrote to Respondent. See Appendix, H-1. This time he specifically advised Respondent that "employees of subsidiaries can only be given free and reduced-rate *overseas* and *foreign* air transportation." Mr. Greene went on to say:

> "Contrary to your representation, corporate structure does make a difference with respect to eligibility for pass privileges. We refer you to Order 72-3-76 (the Order issued by the CAB in connection with the World Airways application) which deals specifically with this subject. Unless Sky Chef employees are legally American employees, American is in violation of the Act when it offers interstate pass privileges to Sky Chef employees."

It should also be noted that Respondent's granting of free or reduced-rate air transportation to certain personnel of Flagship International and AA Development Corporation is not only unauthorized, but also not disclosed officially to the CAB in any document filed with that agency.

It was based upon the aforementioned points and authority that Petitioner commenced this action against Respondent. Respondent's granting of unauthorized free or reduced-rate domestic, or interstate, air transportation to the personnel of its subsidiaries (as noted above) constitutes unjust discrimination proscribed by § 404(b) of the Act (49 USC § 1374(b)). Petitioner and the class of persons represented by

Petitioner in this action (all members of the general public who were charged, and who paid, full fares for transportation aboard Respondent's aircraft within two (2) years prior to the filing of the complaint in this action) suffered recognized and compensable harm as a result of said violative conduct.

Petitioner and Respondent made cross motions for summary judgment in the District Court. Upon consideration of said motions, the District Court granted Respondent's motion, denied Petitioner's motion, and rendered judgment in favor of Respondent.[1]

On appeal, the Court of Appeals for the Ninth Circuit affirmed the District Court on the ground that the controversy in this action, like the controversy in *Danna v. Air France* (2 Cir. 1972) 463 F.2d 407, is within the primary jurisdiction of the CAB. The Court of Appeals reasoned that:

> "(Petitioner's) claim that (Respondent's) free or reduced-rate domestic air fare regulations are invalid or discriminatory is the kind of claim described in *Danna* as requiring a prior CAB determination. Independently of CAB action, there is no right which the court may enforce." (Appendix, A-7.)

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[1] The District Court's determination in this action was based, in part, on the application of the doctrine of *res judicata*. The Court's application of *res judicata* was in turn based upon its misunderstanding of, and confusion with respect to, the material facts and arguments of a prior action involving Respondent and an association of which Petitioner was president. The facts and arguments of the "prior" litigation were not as set forth in the District Court's Memorandum Decision; and the true facts and arguments of the "prior" litigation do not at all justify the application of *res judicata* to the instant action.

After receiving the Opinion of the Court of Appeals, Petitioner filed a timely petition for rehearing advising the Court of Appeals that (1) this action does not in fact present a controversy within the primary jurisdiction of the CAB, and (2) even if primary jurisdiction is applicable to the controversy herein dismissal of the action was improper. See Appendix, D-1 through D-11. The Court of Appeals responded to the petition for rehearing by amending its Opinion with a footnote-discussion of the issue of implication of a private cause of action from a statutory provision. The Court of Appeals concluded in the footnote that, relative to the controversy involved in this action, no private cause of action could be implied from Section 404(b) of the Act. The Court of Appeals denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

We respectfully submit that certiorari should be granted in this case for each of the following reasons.

First, the Court of Appeals in this action rendered a decision that is in direct conflict with decisions of other federal courts of appeal, including the Ninth Circuit, relative to the issues of (1) primary jurisdiction and (2) implication of a private cause of action from a statutory provision.

Second, the Court of Appeals in this action decided an important question of federal law which has not been, but should be settled by this Court; the important question of federal law being whether or not, or under what circumstances, an air passenger has an implied cause of action under § 404(b) of the Act for harm suffered as a result of unjust discrimination.

Third, the decision of the Court of Appeals in this action relative to the aforementioned important question of federal law is in conflict with applicable decisions of this Court in *Touche Ross & Co. v. Redington* (1979) 442 US 560, 99 S.Ct. 2479, *Cannon v. University of Chicago*

(1979) ___ US ___, 99 S.Ct. 1946, and *Cort v. Ash* (1975) 422 US 66, 95 S.Ct. 2080.

Fourth, the decision of the Court of Appeals in this action is in conflict with an applicable decision of this Court in *United States v. Western Pacific Railroad Co.* (1956) 352 US 59, 77 S.Ct. 161.

I.

THE DECISION OF THE COURT OF APPEALS ON THE ISSUES OF PRIMARY JURISDICTION AND IMPLICATION OF A CAUSE OF ACTION IS IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON SAID ISSUES.

The decision of the Court of Appeals in this action appears to be based upon the doctrine of primary jurisdiction. As we noted previously, the Court's Opinion ends with the statements that Petitioner's claim is the kind of claim "requiring a prior CAB determination," and "[i]ndependently of CAB action, there is no right which the court may enforce" (Appendix, A-7). In the petition for rehearing Petitioner submitted that the doctrine of primary jurisdiction is not applicable to this case because (1) the substantive issue in this case has previously been decided by the CAB, (2) the substantive issue in this case is one of violation of the law rather than the reasonableness of Respondent's conduct, and (3) the substantive issue in this case is not limited to the validity of Respondent's regulations on file with the CAB. Petitioner also submitted, in the petition for rehearing, that even the application of the doctrine of primary jurisdiction to this action did not justify dismissal of the action by the District Court. The body of the petition for rehearing is reproduced in the Appendix at D-1 through D-11, and we respectfully refer the Court to the same.

As is evident, the decision of the Court of Appeals in this action is in direct conflict with decisions of other federal courts of appeal on the

issue of primary jurisdiction, including the decision of the Ninth Circuit in *Klicker v. Northwest Airlines, Inc.* (9 Cir. 1977) 563 F.2d 1310. Indeed, the decision of the Court of Appeals in this action stands alone relative to its application of the doctrine of primary jurisdiction to a case in which the central issue has been previously decided by the apposite administrative agency.

To the extent that the Opinion of the Court of Appeals in this action is based upon the conclusion that Petitioner has no implied cause of action under § 404(b) of the Act, the Opinion is, again, in direct conflict with apposite decisions of other federal courts of appeal. In fact, in *every* § 404(b) case similar to the present case -- *i.e.*, in which the § 404(b) violation was based upon unjust discrimination or unreasonable preference against an air passenger in connection with air transportation -- it has been held that there exists an implied cause of action under the Section. *Archibald v. Pan American World Airways, Inc.* (9 Cir. 1972) 460 F.2d 14, 16 ("This section (404(b)) creates a private federal cause of action for unreasonable preferences and unjust discrimination."), *Nader v. Allegheny Airlines, Inc.* (D.C. Cir. 1975) 512 F.2d 527, 537 ("Although the Act does not provide for private enforcement of section 404(b), it is well-settled that a private damage action is available to remedy violations of this provision."), *Fitzgerald v. Pan American World Airways* (2 Cir. 1956) 229 F.2d 449, 501-502, *Mahaney v. Air France* (S.D.N.Y. 1979) 474 F.Supp. 532, 534 ("It is settled that section 404(b) of the Federal Aviation Act provides a private cause of action."), *Karp v. North Cent Airlines, Inc.* (E.D. Wis. 1977) 437 F.Supp. 87, 89, *Gallagher v. Alitalia-Linee Aeree Italiane, S.p.A.* (S.D.N.Y. 1973) 361 F.Supp. 1097, *Mortimer v. Delta Air Lines* (N.D. Ill. 1969) 302 F.Supp. 276, *Wills v. Trans World Airlines, Inc.* (S.D. Cal. 1961) 200 F.Supp. 360.

Indeed, only cases that did not involve alleged injury or harm to air passengers in connection with air transportation refused to find an

implied cause of action under § 404(b). See *Polansky v. Trans World Airlines, Inc.* (3 Cir. 1975) 523 F.2d 332 (involving a claim under § 404(b) based upon alleged breaches of warranty and misrepresentations with respect to certain ground tour accommodations), and *Caceres Agency, Inc. v. Trans World Airways* (2 Cir. 1979) 594 F.2d 932 (involving a travel agent's attempt to sue under § 404(b)).

Thus, the Opinion of the Court of Appeals in this action also stands alone relative to the conclusion that no implied cause of action exists under § 404(b) for an air passenger who has suffered unjust discrimination or unreasonable preference in connection with air transportation.

II.

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Whether or not, or under what circumstances, an implied cause of action exists under § 404(b) of the Act has never been addressed by this Court. We respectfully submit that this substantial federal question should be settled by this Court, in the context of the instant case, for the following reasons.

First, Respondent continues, and absent an appropriate ruling by this Court will continue, to blatantly engage in the unauthorized and violative conduct challenged in this action. Thus, this Court's use of this action as a vehicle to speak to the subject important federal question would, at the same time, address a continuing course of violative conduct engaged in by one of the nation's major air carriers.

Second, the Court of Appeals in this action stated, in its Order Amending Opinion, that this Court's *Touche Ross* opinion "revised the *Cort v. Ash* factors" relative to the implication of a cause of action from

a statutory provision. We respectfully submit that the Court of Appeals erred in this regard. Rather than revising the *Cort* factors, this Court in *Touche Ross* merely poined out that the four factors were not of equal importance. Since the probability exists that lower federal courts will continue to be confused concerning the standard or test to be used to determine whether a cause of action is implied under § 404(b), this Court should resolve that issue at this time.

Third, the Court of Appeals determination that no implied cause of action exists under the circumstances of this case creates precedent so far out of line with other cases decided under § 404(b) of the Act that said determination will most certainly create, or fuel, confusion on this issue in the future.

III.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT IN *TOUCHE ROSS v. REDINGTON, CANNON v. UNIVERSITY OF CHICAGO,* AND *CORT v. ASH.*

The Court of Appeals in this action conceded that "clearly (Petitioner) as a passenger is within the class of persons intended to be protected (by the Act)" (Appendix, A-4). Also, § 104 of the Act (49 USC § 1304) expressly declares the existence of "a public right of freedom of transit through the navigable airspace of the United States." Section 404(b) expressly proscribes "any unjust discrimination or any undue or unreasonable prejudice or disadvantage" in connection with said public right. These facts place the determination of the Court of Appeals, that no implied cause of action exists in this case, at odds with recent applicable decisions of this Court.

In *Touche Ross, supra*, this Court noted that two most important indicators of an implied cause of action in a statute are (1) that the

statute prohibits certain conduct and (2) that the statute creates federal rights in favor of private parties. See *Touche Ross & Co. v. Redington, supra* at 2485 and 2489. As noted above, the instant case contains both such indicators.

In *Cannon v. University of Chicago, supra*, this Court also noted that "the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action" (99 S.Ct. at 1954, n. 13). This Court went on to state in that footnote that:

> "With the exception of one case, . . . this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." (99 S.Ct. at 1954, n. 13.)

Again, the statute in the instant action contains the "most accurate indicator" referred to in *Cannon.*

Finally, the instant case satisfies each of the four factors set forth in this Court's *Cort* opinion, with the exception of the "legislative history" factor. The legislative history relative to the statute in question is silent. Under such circumstances, however, this Court stated in *Cannon*:

> "We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling.'" (99 S.Ct. at 1956.)

The instant case, therefore, satisfies this Court's *Cort* criteria.

IV.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT IN *UNITED STATES v. WESTERN PACIFIC RAILROAD CO.*

As we noted, the CAB has previously decided the underlying substantive issue in this case. See Appendix, F-1 through F-3. Therefore, to the extent that it is based upon application of the doctrine of primary jurisdiction, the Opinion of the Court of Appeals in this action is in conflict with this Court's opinion in *United States v. Western Pacific Railroad Co.* (1956) 352 US 59, 69, 77 S.Ct. 161, 168, wherein this Court stated, "[c]ertainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it."

V.

THE HARM SUFFERED BY PETITIONER IS AS WELL RECOGNIZED AND ESTABLISHED AS THE VIOLATION ITSELF.

As noted previously, Respondent's conduct challenged in this action is clearly violative of the Act. Moreover, such violative conduct, as clearly, constitutes unjust discrimination proscribed by § 404(b). Section 404(b) is intended "to insure that rates and services are offered on an equal basis to all who seek to use the air carriers," and "to protect the traveling public" and "effectuate the 'rule of equality' in the air transportation industry" (*Transcontinental Bus System, Inc. v. C.A.B.* (5 Cir. 1967) 383 F.2d 466, 475). As has occurred as a result of the conduct of Respondent challenged in this action, unjust discrimination under § 404(b) results

> ". . . from the charging of different rates to different shippers or passengers afforded the same service, (citations omitted), or from the offering of special services to only a select patron or group of patrons. (citations omitted) In either situation, the result is that the carrier is giving preferential treatment to one person or a group of persons to the prejudice of another and contrary to the requirement that all those who seek the service of a carrier must be treated equally." (383 F.2d 466, 481-482.)

Accord the CAB:

> ". . . it is generally accepted that the term ('unjust discrimination' as used in § 404(b)) refers to section 2 of the Interstate Commerce Act which precludes different treatment of like traffic for like and contemporaneous service under substantially similar circumstances and conditions. (citation omitted) The concept of different treatment includes the offering of a service to a particular person or class of traffic which is not offered to others." (CAB Opinion, Hawaiian Airlines Senior Citizen Standby Fares, 76-9-147, page 2.)

The CAB has also defined the harm that results from the unjust discrimination referred to in § 404(b):

> "The harm of unjust discrimination stems from its unavailability to passengers not falling within the favored status. *Simply stated, SCSF's* (the reduced-rate fares in question) *harm those who are ineligible for such fares.*" (CAB Opinion, *supra* at page 13) (emphasis added.)

See also *Transcontinental Bus System, Inc. v. CAB, supra* at 476.

Finally, we again refer the Court to the case of *Gallagher v. Alitalia-Linee Aeree Italiane, S.p.A.* (S.D.N.Y. 1973) 361 F.Supp. 1097. In that

case, as in the instant one, a class of full-fare-paying passengers of the defendant air carrier sued the carrier as a result of unauthorized reduced-rate passage given a certain group of persons; the reduced rates being unauthorized in *Gallagher* because they were used prematurely. In *Gallagher*, as in the instant case, it was argued that, by granting unauthorized reduced-rate air transportation to a certain group of passengers, the defendant air carrier "unequally or prejudicially" applied its filed tariff and, in so doing, discriminated against the plaintiff. *Gallagher v. Alitalia-Linee Aeree Italiane, S.p.A., supra* at 1099. The court in *Gallagher* found that such an argument constituted a proper cause of action against the defendant air carrier.

CONCLUSION

For the reasons set forth herein, we respectfully submit that a writ of certiorari should be issued to review the opinion of the Ninth Circuit in this action.

Respectfully submitted,

LLOYD EDWARD TOOKS

Counsel for Petitioner
James A. Montgomery

APPENDICES

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 28 1980
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

JAMES A. MONTGOMERY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

vs.

AMERICAN AIRLINES, INC., a corporation,

Defendant-Appellee.

No. 78-2608

OPINION

Appeal from the United States District Court for the Southern District of California

Before: ELY and WALLACE, Circuit Judges, and KING,* District Judge

KING, District Judge:

This is an appeal from the action of the district court, on cross motions for summary judgment, granting judgment in favor of Appellee American Airlines, Inc. (defendant below) and against Appellant James A. Montgomery (plaintiff below).

The district court based its action on the grounds that (1) the action was barred under the doctrine of *res judicata*, and (2) that the complaint failed to state a cause of action upon which relief could be granted. We affirm on the latter ground.

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*Honorable Samuel P. King, Chief United States District Judge, District of Hawaii, sitting by designation.

Appellant Montgomery's complaint was filed on September 15, 1977, as a class action on behalf of himself and all individuals who purchased scheduled domestic air transportation from Appellee American Airlines, Inc., during the preceding two years. He alleged that American's practice of granting free and reduced rate transportation to certain officers and employees of two wholly-owned subsidiaries of American, violates Sections 403(b) and 404(b) of the Federal Aviation Act, 49 U.S.C. §§ 1373(b) and 1374(b), and regulations promulgated thereunder by the Civil Aeronautics Board, 14 C.F.R. par. 223.1, *et seq.* The complaint prayed for $2,000,000,000 (two billion dollars) in damages, calculated as the difference between the fares paid by all of American's air passengers for a two-year period and the free or reduced rates granted to American's subsidiary's employees. American moved for summary judgment on the grounds of failure to state a claim upon which relief could be granted, *res judicata*, and estoppel. Montgomery filed a cross-motion for summary judgment. No class has ever been certified.

Montgomery is a Skycap at San Francisco International Airport. He works for a firm called Allied Aviation Maintenance Service Company of California. His employer assigns Montgomery to attend to passengers of American. Montgomery is also the founder and president of the National Association of Skycaps, Incorporated (NASCAP).

American grants free and reduced-rate air transportation to its employees, some of whom are skycaps. American has on file with the CAB its regulations governing entitlement to passes. These regulations specifically provide for the granting of passes to employees paid by certain subsidiary corporate entities, and have so provided for the past 36 years. American takes the position that its practice with respect to free and reduced-rate transportation is permitted by Section 403(b) of the Federal Aviation Act, 49 U.S.C. § 1373(b), and regulations promulgated thereunder, 14 C.F.R. par. 223.1, *et seq.* On September 19, 1974, Montgomery, acting for NASCAP, wrote to American

demanding the same pass privileges for all Skycaps servicing the airline as were granted to employees of American. Part of his letter defines the dispute as follows:

> Skycaps who are directly employed by the airlines now have this privilege [of obtaining free or reduced-rate air transportation] as part of their fringe benefit package with their airline employer. Those skycaps employed by contractors, performing the same service as airline Skycap employees do not have pass privileges and must defray the full costs of all air transportation.
>
> In our opinion, this is a blatant act of job discrimination. It is our analogy that Skycaps perform the same service to airlines, regardless of the employer, and therefore should be entitled to the same privileges.

American replied that it could not issue passes as requested by NASCAP because the Federal Aviation Act did not permit the issuance of passes to employees of independent contractors.

On August 26, 1975, NASCAP filed suit in the United States District Court for the Central District of California, asserting that American's refusal to grant passes to members of NASCAP was "unjust discrimination" in violation of Section 404(b) of the Federal Aviation Act, 49 U.S.C. § 1374(b). *NASCAP, Inc. v. American Airlines, Inc.*, No. CV-75-2872-HP. On April 12, 1977, this action was dismissed on the ground that primary jurisdiction of a claim of discrimination based on the contents of an airline regulation is with the Civil Aeronautics Board. No appeal was taken from this dismissal.

Shortly thereafter, the action of *Complaining Skycaps v. American Airlines, Inc.*, CAB No. 30881, was filed with the Civil Aeronautics Board. This action also alleged unjust discrimination in violation of Section 404(b) of the Federal Aviation Act, 49 U.S.C. § 1374(b). On January 6, 1978, the CAB dismissed the action on the ground that the Complaining Skycaps' disagreement with American was a private labor

dispute over a fringe benefit and not an unjust discrimination cognizable under the Federal Aviation Act. No appeal was taken from this dismissal.

While the CAB action was pending, and during the morning of August 25, 1977, Mr. Montgomery took a round-trip flight on an American Airlines plane between San Diego and Los Angeles for the specific purpose of laying the evidentiary basis for a class action. This action was then filed in the United States District Court for the Southern District of California. Summary judgment for American was entered on May 24, 1978.

Section 404(b) of the Federal Aviation Act, 49 U.S.C. § 1374(b), does not by its terms provide a private right of action for damages. Nevertheless, such a private right of action has been implied under various circumstances. The factors which must be considered in determining whether a private remedy for damages is implicit in a statute have been enunciated by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). Four factors are set forth.

> 1. Does the statute intend to protect this class of person from this harm?
>
> 2. Did the legislature indicate any intent to create or deny a private remedy?
>
> 3. Would the private remedy be consistent with the legislative goals?
>
> 4. Is the cause of action one traditionally left to state law?

As applied to the Federal Aviation Act, clearly Plaintiff as a passenger is within the class of persons intended to be protected, the Congress did not express any intent as to a private remedy for damages, and a cause of action based on Section 403(b) of the Federal Aviation Act and applicable CAB regulations is not one traditionally left to state

law. Difficulties arise when considering whether the harm complained of is of the type intended to be protected against under Section 404(b) of the Federal Aviation Act, and whether a private remedy in this special situation is consistent with the legislative goals. To resolve these difficulties, it is necessary to take a closer look at Mr. Montgomery's claim of discrimination.

Section 403(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1373(b)(I), as amended, specifically permits free or reduced-fare rates under certain circumstances. The relevant statutory language reads as follows:

> Nothing in this chapter shall prohibit . . . air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier) . . .; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe.

By regulations promulgated by the CAB in this regard "[a]ny carrier engaged in overseas or foreign air transportation may provide free or reduced rate overseas or foreign air transportation" to, among others, "[d]irectors, officers, and employees and members of their immediate families, of any affiliate of such carrier, the name of which affiliate currently is included in the list of affiliates filed by such carrier pursuant to § 223.7 . . . ." 14 C.F.R. § 223.2(b)(1). An "affiliate" is defined in 14 C.F.R. § 223.1 and the definition implicitly includes corporate subsidiaries of air carriers.

Montgomery argues that, when read together, the statute and the regulations do not permit the granting of free or reduced-rate domestic air transportation to directors, officers, and employees of affiliates of

of air carriers. He relies in part on an opinion letter by the General Counsel of the CAB, which states:

> Neither the Act nor the Board's regulations authorize free or reduced-rate interstate transportation for the officers, directors, or employees of affiliates of air carriers. Section 403(b) of the Act limits free and reduced rates in interstate air transportation to certain named classes of persons, including employees of air carriers, but not employees of air carrier affiliates. . . .
>
> It may be noted that section 403(b) authorizes the Board to expand the scope of free and reduced-rate transportation in overseas and foreign air transportation and section 223.2(b)(1) of the Board's Economic Regulations (14 C.F.R. § 223.2(b)(1)) permits carriers to provide free and reduced-rate overseas and foreign air transportation to employees of its affiliates. As indicated above, however, it does not authorize free or reduced-rate *interstate* transportation for such persons. . . .

A similar question has been the subject of correspondence between the CAB and American. On August 10, 1976, Mr. James W. Greene, Chief of the Tariffs Section of the CAB, wrote to American requesting, among other things, the "basis for including Sky Chefs in the definition of *Company* in your free and reduced-rate manual." The letter went on to state that "If Sky Chefs qualifies only as an 'affiliate' of American then pass privileges for Sky Chefs personnel must be restricted as required by Part 223.2(b)(1)". In a later letter, Mr. Greene specifically advised American that "employees of subsidiaries can only be given free and reduced-rate *overseas* and *foreign* air transportation". Mr. Greene referenced CAB Order 72-3-76 denying an application by World Airways, Inc., requesting permission to provide free or reduced-rate domestic air transportation to employees of World Air Center, a wholly-owned subsidiary of World Airways, Inc.

The foregoing exposition makes it clear that Montgomery is really alleging that American is in violation of Section 403(b) of the Federal Aviation Act (and regulations promulgated in connection therewith). This is another aspect of the same complaint that was made in *NASCAP, Inc. v. American Airlines, Inc.* in the Central District of California. The issue remains the scope and validity of American's regulations on file with the CAB relating to free and reduced-rate domestic air transportation for directors, officers, and employees.

Danna v. Air France, 463 F.2d 407 (2d Cir. 1972) makes the distinction between a claim that a filed tariff is either unreasonable in amount or unduly discriminatory in effect, and a claim that a carrier has violated its own filed tariff or established transportation custom. The former claim is within the primary jurisdiction of the CAB. The latter claim does not require prior CAB action. The rationale for this distinction, as elucidated in *Danna*, equates primary jurisdiction of the CAB with the legislative goals sought to be achieved by the Federal Aviation Act.

Montgomery's claim that American's free or reduced-rate domestic air fare regulations are invalid or discriminatory is the kind of claim described in *Danna* as requiring a prior CAB determination. Independently of CAB action, there is no right which the court may enforce.

The judgment of dismissal is AFFIRMED.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES A. MONTGOMERY, on behalf of himself and all others similarly situated, Plaintiff, v. AMERICAN AIRLINES, INC., a Corporation, Defendants.	Civil No. 77-588-T **MEMORANDUM DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

Plaintiff James Montgomery and defendant American Airlines moved the court to award them summary judgments on May 15, 1978, in this class action suit for discrimination in violation of § 404(b) [49 U.S.C. § 1374(b)] of the Federal Aviation Act ("Act") of 1958. Having carefully considered the parties' exhaustive briefs and their oral arguments, the court concludes that summary judgment in favor of defendant is appropriate. Plaintiff's suit is barred by the doctrine of *res judicata*; further, plaintiff has no implied right of action under § 404(b).

HISTORY OF THE CASE

An understanding of the litigation in which plaintiff has been involved in varying degrees against defendant is crucial to an understanding of the court's disposition of the instant motions.

Plaintiff is the president of National Association of Skycaps ("NASCAP"), an organization of air terminal baggage handlers employed by independent contractors and doing work for defendant. In 1974, plaintiff, on behalf of NASCAP, wrote to defendant demanding that the members be granted the same pass privileges that are granted to skycaps employed by defendant's wholly-owned subsidiary and

considered by American to be its employees. Defendant denied the request, informing plaintiff that the law prohibited issuance of passes to employees of independent contractors.

NASCAP then brought an action against American in the Central District of California, asserting essentially that they were every bit as much "employees" of American as were the wholly-owned subsidiary's skycaps, and thus were discriminated against in violation of § 404(b), which prohibits discrimination by air carriers. NASCAP sought passes for its members, as well as damages. United States District Judge Pregerson dismissed that action, determining that primary jurisdiction lay with the CAB.

The skycaps then went before the CAB, maintaining once again that they were "employees" of American and that therefore denial of passes to them was unjustly discriminatory. The CAB dismissed the suit, finding that there was no discrimination, only a private labor dispute between the complaining skycaps and American. It found that American was justified in granting passes to one group and not another, even if both groups were "employees" of the company.

In the present action, instituted only a few months after the CAB's dismissal, plaintiff, who was the prime mover of the other actions, filed against American on behalf of himself and all others similarly situated. In this suit plaintiff takes a different approach to the pass issuance problem. He argues that even the skycaps who were granted passes by American are not "employees" of the company, and that therefore American is discriminating against its other passengers by not issuing the same passes to them. The current action seeks not passes but $2 billion in damages.

We turn now to consideration of the issues raised by the present motions.

I. JUDICIAL ESTOPPEL

Defendant urges the court to find that plaintiff is estopped from maintaining this suit because he is arguing a position that is inconsistent with and contradictory to that put forth in the two previous actions. That is, the skycaps maintained and based those suits on the premise that they were employees of American, along with the subsidiary skycaps, while plaintiff now asserts that the latter group are *not* employees, and thus implicitly acknowledges that neither are members of his group.

The broad rule of judicial estoppel is set forth in *Scarana v. Central R. Co. of New Jersey,* 203 F.2d 510, 513 (3rd Cir. 1953):

> [A] party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits. II Freeman on Judgments § 631 (5th ed. 1925).

This doctrine applies to both a party and his privies. *In re Johnson,* 518 F.2d 246, 252 (10th Cir. 1975). Defendant has made a more than adequate showing that Montgomery is a privy of the plaintiffs in both of the previous actions. For example, Montgomery initiated the prior actions; his letter to American constituted the original demand for passes; he would have benefited as a member of NASCAP, had American acquiesced; he is the founder and only president of NASCAP; and his personal attorney was the attorney of record in the other suits.

In order to invoke the doctrine, a court must determine also that the issues in the actions are identical. *In re Johnson, supra,* 518 F.2d at 252. The issue in the present suit is close, if not identical, to that raised in the prior actions: is defendant liable to plaintiff (or his privies) for discrimination in violation of § 404(b)? In order to demonstrate such

discrimination in the earlier actions, the skycaps sought to establish that they were employees along with the subsidiary's employees; in the instant suit, plaintiff tries to prove discrimination by arguing that *none* of the skycaps is an employee of American.

It is important to note, however, that judicial estoppel has been applied most frequently to prevent a party who prevailed in a prior action from coming back and prevailing again via self-contradiction. *See, e.g., Scarano v. Central R. Co. of New Jersey, supra*, 203 F.2d at 513; *Selected Risks Insurance Co. v. Kobelinski*, 421 F.Supp. 431 (E.D. Pa. 1976). The *Scarano* court expressed its concern thus:

> A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate.

203 F.2d at 513.

This court does not perceive in the present case the evil that the *Scarano* court described. First, plaintiff or his privies did not prevail in the previous actions. Second, plaintiff's change of position seems to have resulted largely from indications by the CAB that American's issuing passes to its subsidiary's employees is improper. He is not playing "fast and loose" with the court. Therefore, this is not an appropriate case in which to apply the estoppel doctrine. It is not necessary, either; to the extent that plaintiff is bringing the same action as his privies did before, the doctrine of *res judicata* will suffice to bar the use of multiple theories to achieve the desired end, if plaintiff had an opportunity fully to litigate his claim.

II. RES JUDICATA

> The rule of *res judicata* provides: [W]hen a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) (citation omitted).

That plaintiff is a privy of NASCAP has been demonstrated satisfactorily by defendant. The remaining issue is whether the present cause of action is the same as that in NASCAP's action before the CAB. If it is, then this action is barred.

Defining just what is a "cause of action" for *res judicata* purposes is not easy. Repetition of a claim, through argument of a new theory or new facts, should not be permitted; emphasis should be placed on whether a party has had his "day in court" in which to press his claims. *See* 1B Moore's Federal Practice par. 0.410, at 1154-57 (2d ed. 1965). A judgment should not be reopened each time a new reason occurs to a party. *Lester v. National Broadcasting Co.*, 217 F.2d 399, 400 (9th Cir. 1954).

Defendant asserts that plaintiff's cause of action is the same in this suit as the action before the CAB, even though the theory of discrimination and the requested relief are different. American maintains that plaintiff has merely figured out a new way to attack it, which should have been posited before; according to American, the core of the problem is its refusal to grant plaintiff's organization reduced-rate transportation, and plaintiff should not be permitted to resurrect this complaint each time he develops a new theory.

Plaintiff contends that the actions are completely different because the first concerned the propriety of granting passes to one group of employees and not another, while the present one involves the disparate issue of the legality of granting passes to officers, directors, and employees of subsidiary corporations.

Defendant's argument is persuasive. Mindful that a party must not be deprived of his right to present his claim to a court, this court concludes, nevertheless, that plaintiff has had his day in court. The operative facts of the instant suit are identical to those of the action before the CAB. Plaintiff could have and should have tried his present theory at that time, rather than bring defendant to court once again and attack upon a new theory. The new grounds and the different request for relief do not make a fresh cause of action. Plaintiff's latest suit is an attempt to secure damages based on American's refusal to issue passes to his organization. Having had an opportunity to present any and all theories of recovery, plaintiff is bound by the CAB's decision. Plaintiff's argument that this is the wrong result because it leads to the conclusion that he could not later sue for *racial* discrimination is specious--such discrimination would plainly not involve the same operative facts. Our holding will best effectuate *res judicata's* principle of repose, assuring an end to the litigation between these parties.

The court does not rest its decision solely on the conclusion that the suit is barred by *res judicata*. We find, additionally, that plaintiff has not stated a claim under § 404(b) upon which relief may be granted.

III. FAILURE TO STATE A CLAIM

The issue whether the kind of discrimination alleged by plaintiff constitutes a cause of action has not been adjudicated in any jurisdiction. Defendant incorrectly terms this question one of whether the court has jurisdiction to entertain this action; the inquiry is, instead, whether the Federal Aviation Act provides plaintiff a private right of action for the discrimination about which he is complaining.

Section 404(b) does not expressly provide for a private right of action. In determining whether a cause of action is available to plaintiff, this court is guided by the analysis provided by the Third Circuit Court of Appeals in *Polansky v. Trans World Airlines*, 523 F.2d 332 (3rd Cir. 1975). Although the facts of that case are not similar to those of the present action, that court's approach to the instant action is apposite. The court in *Polansky* opined that since § 404(b) does not expressly authorize a private remedy in federal court for its violation, "each new category of conduct alleged to violate [§ 404(b)] must be tested against the standards stated by the Supreme Court in *Cort v. Ash* [422 U.S. 66, 78 (1975)]." *Id.* at 335. *Cort* governs the determination whether a private remedy is implicit in a statute not expressly providing for one.

Plaintiff would have this court follow the holdings in *Gallagher v. Alitalia-Linee Aeree Italiane S.p.A.*, 361 F.Supp. 1097 (S.D.N.Y. 1973), and *William Becker Travel Bureau v. Sabena Belgian World Airways*, 13 Avi. 17, 771 (6-75), which, he argues, favor his position. Even assuming that those cases are on point, their precedential value is minimized by their not having been decided pursuant to the analysis prescribed by *Cort*, whose standards are determinative of this court's authority to imply a remedy under § 404(b). *See Mason v. Belieu*, 543 F.2d 215, 211 (D.C. Cir. 1976).

The first *Cort* inquiry is whether plaintiff is "one of the class for whose *especial* benefit the statute was enacted." *Cort, supra*, at 78. Plaintiff, as an air passenger, is clearly a member of the class protected by the statute, as that provision prohibits subjecting "any person" to discrimination.

The second *Cort* test is whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Id.* No indication of congessional [*sic*] intent is provided by the legislative history. *Mason v. Belieu, supra*, 543 F.2d at 221; *Polansky, supra*, 523 F.2d at 336.

The third and most crucial inquiry is whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." *Cort, supra,* at 78. Both the language of the Act and cases interpreting it suggest that giving plaintiff a private remedy would not be consistent with the legislative goals. The purposes of the Act can be divined from 49 U.S.C. §§ 1302(c) and 1304; these provisions indicate that the Act promotes free and equal *access* to air facilities. *See Polansky, supra,* at 336-37. There is no issue concerning equal access in this case.

Further, it appears that § 403(b), [49 U.S.C. § 1373(b)], which defendant is alleged to have violated, was intended to give the CAB authority to regulate the airlines. In a case not involving a § 404(b) claim, the same court that decided *Polansky* held that § 403(b) does not provide a private remedy for its violation because that section "was designed to empower the CAB to control the supposedly pernicious competitive activities that were the target of the Federal Aviation Act." *Wolf v. Trans World Airlines,* 544 F.2d 134, 137 (3rd Cir. 1976). If a violation of § 403(b) gives a plaintiff no right of action, then that plaintiff should not be afforded a remedy by the device of alleging discrimination under § 404(b). In the case at bar, plaintiff is doing just that; he has turned what is really a charge of violating § 403(b) into a charge of discrimination under § 404(b). Surely the drafters of the Act did not contemplate a right of action under § 404(b) to resolve a problem for which they did not intend a private remedy under § 403(b).

The court is further persuaded that § 404(b) was not meant to provide private redress for a violation of § 403(b) by the legislative history of certain amendments to § 403(b). For example, in H.R. Rep. No. 517, 86th Cong., 1st Sess. 2 (1960), regarding proposed legislation to expand the categories of persons entitled to reduced-rate transportation, the House Committee indicated that carrier action under the legislation would be subject to CAB control. This statement, while not giving the

Board exclusive powers, does suggest that monitoring carrier conduct under § 403(b) is primarily the responsibility of the CAB.

Assignment to the CAB of sole responsibility for enforcing § 403(b) is warranted by that agency's special expertise in the field of airline regulation. Whether and to what extent American is violating § 403(b) can be answered best by the CAB, for it is most familiar with the Act and regulations that it has promulgated under the Act. Moreover, the Board is best suited to fashion remedies that are likely to effectuate the long-range goals of the Act. For this court to consider the merits of the present complaint would be to invade the CAB's province.

The fourth *Cort* standard--whether the "cause of action [is] one traditionally relegated to state law," *Cort, supra*, at 78--is not relevant to this case.

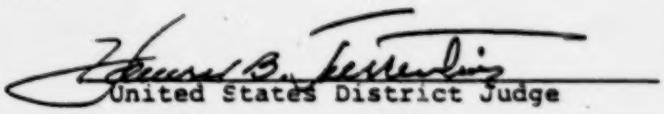
For the reason stated above, the court declines to find that § 404(b) implies a private right of action for plaintiff.

Accordingly,

IT IS ORDERED that defendant's motion for summary judgment be, and the same hereby is, granted.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment be, and same hereby is, denied.

DATED: May 23, 1978.



COPY TO:

LLOYD EDWARD TOOKS, ESQ.
225 Broadway, 15th Floor
San Diego, CA 92101

DONALD D. CONNORS, JR., Esq.
Spear Street Tower
One Market Plaza
San Francisco, CA 94105

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD H. DEMING
CLERK, U.S. COURT OF APPEALS

JAMES A. MONTGOMERY, on behalf of himself and all others similarly situated, Plaintiff-Appellant, vs. AMERICAN AIRLINES, INC., a corporation, Defendant-Appellee.	NO. 78-2608 ORDER AMENDING OPINION and DENYING PETITION FOR REHEARING

Appeal from the United States District Court
for the Southern District of California

Before: ELY and WALLACE, Circuit Judges,
and KING,* District Judge

The opinion heretofore filed herein is amended by adding a footnote numbered "1" following the word "damages" in the eleventh paragraph of the opinion in the context and manner "the Congress did not express any intent as to a private remedy for damages,[1]" and reading:

> In *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979), the Supreme Court held that no implied private right of action for damages exists under section 17(a) of the Securities Exchange Act of 1934. In finding no private right of action, the court discussed the *Cort v. Ash* test as follows:
>
> > It is true that in *Cort v. Ash,* the Court set forth four factors that it considered 'relevant'

*Honorable Samuel P. King, Chief United States District Judge, District of Hawaii, sitting by designation.

> in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action . . . . Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And the parties as well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17(a). At least in such a case as this, the inquiry ends there: the question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative. 442 U.S. at 575-76.

The Court in *Touche Ross* has therefore revised the *Cort v. Ash* factors. It is no longer sufficient to show that the legislature did not indicate any intent to deny a private remedy. There must be a showing that either the statute proscribes the conduct complained of as unlawful or that the statute by its terms grants private rights to any identifiable class. There was no such showing with respect to section 404(b) of the Federal Aviation Act in the instant case.

The Court cited *Touche Ross* with approval in *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis,* 444 U.S. 11 (1979). In *Lewis*, the Court found a limited private remedy to void an investment advisers contract under the Investment Advisers Act of 1940 where the Act provided that contracts whose formation would violate the Act "shall be void . . . as regards the

> rights of" the violator. The Court, however, refused to find an implied cause of action for damages. 444 U.S. at 25.

Except for the addition of this footnote, the opinion is reaffirmed and the Petition for Rehearing is DENIED.

D-1

NO. 78-2608

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES A. MONTGOMERY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC., a corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of California

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PETITION OF PLAINTIFF-APPELLANT,

JAMES A. MONTGOMERY, FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, James A. Montgomery, plaintiff-appellant herein, respectfully petitions this Court for rehearing on the subject appeal for the following reasons.

I. The Doctrine Of Primary Jurisdiction Is Not Applicable To This Case Because The CAB Has Previously Decided The Issue In This Case.

Pursuant to Rule 40, Federal Rules of Appellate Procedure, a rehearing on an appeal is appropriate when, in making its decision, the appellate court overlooks or misapprehends a point of law or fact. In the Opinion of this Court entered on the present appeal the judgment of the district court was affirmed on the ground of primary jurisdiction. As the Opinion concludes:

> "Montgomery's claim that American's free or reduced-rate domestic air fare regulations are invalid or discriminatory is the kind of claim described in *Danna* as requiring a prior CAB determination. Independently of CAB action, there is no right which the court may enforce" (Opinion, page 7).

We respectfully submit that this Court misapprehended or overlooked applicable law in applying the primary jurisdiction doctrine to this case since the CAB has previously decided the sole issue in this case.

The sole issue in this case is whether American Airlines, Inc. (hereinafter referred to as "defendant") is violating §404(b) of the Federal Aviation Act of 1958 (hereinafter referred to as the "Act") by granting free and reduced-rate domestic air transportation to officers, directors and employees of certain subsidiary corporations. See Appellant's Reply Brief, page 1. The CAB has previously decided this precise issue. In denying the request of World Airways to provide free or reduced-rate domestic air transportation to the employees of a World wholly-owned subsidiary, the CAB reviewed the applicable law and expressly decided that said law "does not authorize free or reduced-rate interstate transportation for such persons" (Clerk's Record ("CR"), page 158). See also Appellant's Opening Brief, pages 10-11. The General Counsel of the CAB confirmed the unambiguous meaning of the Board's statement in

the World Airways matter in an opinion letter to counsel for plaintiff herein:

> "Neither the Act nor the Board's regulations authorize free or reduced-rate interstate transportation for the officers, directors, or employees of affiliates of air carriers" (CR, page 155).

See also Appellant's Opening Brief, page 9. Moreover, the Chief of the Tariffs Section of the CAB has advised defendant directly that "employees of subsidiaries can only be given free and reduced-rate *overseas* and *foreign* air transportation" (CR, page 162). See also Opinion, page 6, and Appellant's Opening Brief, pages 11-12.

Thus, the issue involved in the present case has not only been previously decided by the CAB, the decision of the CAB relative to said issue was used as authority by the Chief of the Tariffs Section when he advised defendant that the conduct challenged in the present action is unlawful. See Opinion, page 6.

In *Klicker v. Northwest Airlines, Inc.* (9 Cir. 1977) 563 F.2d 1310, the CAB had previously spoken on, and decided, the primary issue in the case. Accordingly, this Court stated:

> "We first dispose of Northwest's primary jurisdiction argument by holding that it has no application where, as here, the CAB has heretofore decided that the exculpatory tariff rule is 'unlawful' . . .
>
> Primary jurisdiction is a concept that expresses both initial deference to the administrative agency and the concern for conservation of judicial resources. (Citation omitted) Neither purpose is served by using the doctrine when the agency has already said what it thinks about this exculpatory tariff" (563 F.2d at 1312-1313).

This Court succinctly reiterated its holding in this regard later in the opinion:

> "*No deference* (to the CAB) *is required*, as we have pointed out, *when the agency has decided the issue in another case*" (563 F.2d at 1315) (emphasis added).

See also, *United States v. Western Pacific Railroad Co.* (1956) 352 US 59, 69, 77 S.Ct. 161, 168 ("Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it"); *Viking Travel, Inc. v. Air France* (D. New York 1978) 462 F.Supp. 28, 43 ("When the CAB has exercised its jurisdiction under the Act and has considered and acted upon the specific regulatory issues underlying the . . . action, the doctrine of primary jurisdiction need not be invoked"); *Agar Food Products Co.* (N.D. Ill. 1973) 358 F.Supp. 1312, 1313 (". . . the doctrine of primary jurisdiction should not be applied where an agency has issued prior rulings and made its position clear on the issue sought to be referred to the agency").

Thus, the decision in the present case is not only in conflict with Supreme Court precedent, it is also in conflict with a prior Ninth Circuit case-in-point. Indeed, to borrow a thought contained in this Court's opinion affirming Judge King's decision in *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, "(i)n light of the proceedings that have already been held by the CAB . . . it is difficult to understand precisely what (this Court) considers should now be remanded to the Board for further consideration" (489 F.2d 203, 211).

II. The Doctrine Of Primary Jurisdiction Is Not Applicable To This Case Since The Issue Herein Is One Of A Violation Of The Law Rather Than The Reasonableness Of The Challenged Conduct.

We further respectfully submit that this Court overlooked or misapprehended the following applicable law in making its decision in the present case. As stated by the court in *Civil Aeronautics Board v. Modern Air Transport* (2 Cir. 1950) 179 F.2d 622, 624:

> "(The primary jurisdiction) doctrine is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule. Thus, it has been continuously asserted that courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation, rather than reasonableness."

See also, *US Tour Operators Ass'n v. Trans World Airlines* (2 Cir. 1977) 556 F.2d 126, 130 ("The test for applying the primary jurisdiction doctrine is the nature of the legal issue before the court: If the question is whether the CAB rule is reasonable, the doctrine applies; it does not apply if the issue is whether the rule has been violated."); *World Airways, Inc. v. Northeast Airlines, Inc.* (1 Cir. 1965) 349 F.2d 1007, 1010-1011.

As noted in the Opinion of this Court in the present action, the issue in this case is whether defendant's "practice of granting free and reduced rate transportation to certain officers and employees of two wholly-owned subsidiaries of American, *violates* . . . the Federal Aviation Act . . . and regulations promulgated thereunder" (Opinion, page 1). Thus, the present case has nothing to do with, and has never concerned, the reasonableness or unreasonableness of defendant's conduct challenged herein. The sole, and well-supported, premise of the plaintiff is that defendant's challenged conduct *violates* the applicable law - i.e., the

conduct is not authorized by either the Federal Aviation Act or the applicable regulations promulgated thereunder - and for that reason violates §404(b). The challenge in the present action, then, is unlike the one made in the case relied upon by this Court, *Danna v. Air France* (2 Cir. 1972) 463 F.2d 407. In *Danna* the reduced-rate (Youth Fare) was approved by the CAB prior to defendant's use of same. The plaintiffs in *Danna* challenged the Youth Fare, therefore, solely on the ground that the fare was *unreasonable* and, for that reason, violated §404(b).

III. Application Of The Doctrine Of Primary Jurisdiction Does Not Justify Dismissal Of This Action.

We respectfully submit that this Court misapprehended or overlooked applicable law in affirming the dismissal of this action.

Even if the primary jurisdiction doctrine was applicable to this case it would not justify dismissal. Again as this Court stated in *Klicker, supra*:

> "The primary jurisdiction doctrine is a rule of initial deference, not a judicially imposed limitation on the power of the court. Thus, when the agency has not decided the tariff question, *the district court does not dismiss the action; it simply stays the litigation pending resort to the administrative tribunal*" (563 F.2d at 1315) (emphasis added).

See also, *United States v. Philadelphia National Bank* (1963) 374 US 321, 353, 83 S.Ct. 1715, 1736 ("Court jurisdiction is not thereby ousted (by the application of the primary jurisdiction doctrine), but only postponed"); *Woodlands Tele. Corp. v. Am. Tel. & Tel. Co.* (S.D. Texas 1978) 447 F.Supp. 1261, 1267 ("... a determination to invoke the doctrine of primary jurisdiction will not result in dismissal of a case but will only involve a staying of further action until the questions certified to the administrative agency have been resolved"); *MCI Communications Corp. v. Am. Tel. & Tel. Co.* (N.D. Ill. 1978) 462 F.Supp. 1072,

1079 ("Rather than dismissing the case entirely, . . ., a court which applies the doctrine of primary jurisdiction merely stays its proceedings and refers certain factual or legal questions to the administrative agency for preliminary determination"); *Borough of Ellwood City, Pa. v. Pa. Power Co.* (W.D. Penn. 1979) 462 F.Supp. 1343, 1354 ("primary jurisdiction does not go to the question of whether a claim has been stated; rather it is a question of procedure").

IV. The Issue In This Case Is Not Limited To The Scope Or Validity Of American's Regulations On File With The CAB.

In the Opinion in the present case this Court states that, "(t)he issue remains the scope and validity of American's regulations on file with the CAB relating to free and reduced-rate domestic air transportation for directors, officers, and employees" (Opinion, page 6). We respectfully submit that the Court misapprehended a material fact in this regard. In this action plaintiff has, of course, challenged the right and authority of defendant to grant free and reduced-rate domestic air transportation to the employees of Sky Chefs, an affiliate of defendant and an entity included in the definition of "Company" in defendant's "free and reduced-rate manual" on file with the CAB. See Opinino, page 6. However, as admitted by defendant and as set forth in Appellant's Opening Brief (page 6), Sky Chefs is by no means the only affiliate of defendant whose personnel receive free and reduced-rate domestic air transportation. The other such affiliates are Flagship International, Inc. and Round Rock Lime Corporation; and neither of these two entities is mentioned in defendant's "free and reduced-rate manual" on file with the CAB. Thus, with respect to Flagship International and Round Rock Lime Corporation, defendant grants free and reduced-rate domestic air transportation that is not only unauthorized by the Act and the regulations promulgated thereunder, but also not officially disclosed to the CAB in any tariff or other document filed with that agency.

In light of the above, and again unlike the situation in *Danna v. Air France, supra,* this action goes far beyond challenging conduct set forth in a tariff or other document filed with the CAB. For this additional reason the primary jurisdiction doctrine is inapplicable.

V. The Harm Complained Of In This Action Is Of The Type Protected Against Under Section 404(b).

In the Opinion in this action the Court took the position that "(d)ifficulties arise when considering whether the harm complained of is of the type intended to be protected against under Section 404(b)" (Opinion, page 4). We respectfully suggest that any ostensible difficulty in this regard is removed by considering prior apposite CAB and judicial pronouncements.

In substance, the plaintiff in the present action contends that defendant is offering an unauthorized special service (free and reduced-rate domestic air transportation) to a particular group of persons; said special service not having been offered to the general public. Plaintiff further contends that those persons who are by definition ineligible for the special service are unjustly discriminated against and harmed thereby. Both the CAB and the Fifth Circuit have confirmed that such harm and unjust discrimination are protected against under §404(b). See Appellant's Opening Brief, pages 23-25.

Finally, with respect to the Court's concern "whether a private remedy in this special situation is consistent with the legislative goals", we again refer the court to the Supreme Court case of *Cannon v. University of Chicago* (1979) ____ US ____ 99 S.Ct. 1946, 1954, n. 13, and the case of *Wills v. Trans World Airlines, Inc.* (S.D. Cal. 1961) 200 F.Supp. 360, 363; said opinions being cited in plaintiff's memorandum of decisions rendered after the filing of plaintiff's reply brief. *Wills* makes it clear that §404(b) "is plainly intended to provide individual passengers with a Federal right to service without undue or

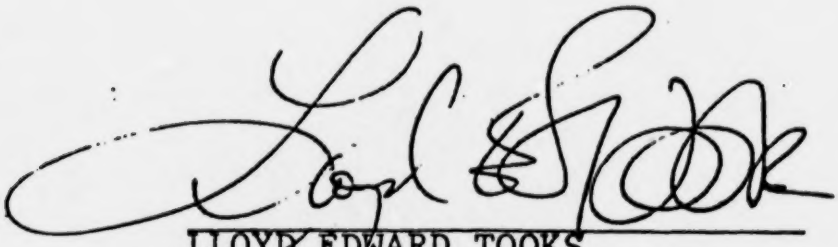
unreasonable discrimination" (200 F.Supp. at 363). The Supreme Court in *Cannon* advised that such a right-creating aspect in a statute is "the most accurate indicator of the propriety of implication of a cause of action" (99 S.Ct. at 1954, n. 13).

VI. Conclusion

Based upon the foregoing, we respectfully submit that this Court should rehear and reconsider the appeal in this case.

Dated: August 5, 1980

Respectfully Submitted



LLOYD EDWARD TOOKS
Attorney for Plaintiff-Appellant

Mr. Lloyd Edward Tooks
Suite 2700
Mutual Benefit Life Plaza
5900 Wilshire Boulevard
Los Angeles, California 90036

July 6, 1977

Dear Mr. Tooks:

Thank you for your letter of June 16, in which you request the opinion of this office about the grant of airline pass privileges in domestic air transportation. In particular, your letter asks whether an air carrier, under the Federal Aviation Act or the Board's regulations, is permitted to grant pass privileges for free or reduced-rate interstate air transportation to officers, directors, or employees of a wholly-owned subsidiary of the carrier.

Neither the Act nor the Board's regulations authorize free or reduced-rate interstate transportation for the officers, directors, or employees of affiliates of air carriers. Section 403(b) of the Act limits free and reduced rates in interstate air transportation to certain named classes of persons, including employees of air carriers, but not employees of air carrier affiliates. In Order 72-3-76, the Board denied the application of World Airways, Inc., to provide free or reduced-rate transportation to employees of a wholly-owned subsidiary, World Air Center, on the basis that the subsidiary was a separate corporate entity. World Air Center's employees were therefore not employees of the air carrier. I have enclosed a copy of this order for your convenience.

It may be noted that section 403(b) authorizes the Board to expand the scope of free and reduced-rate transportation in overseas and foreign air transportation, and section 223.2(b)(1) of the Board's Economic Regulations (14 CFR §223.2(b)(1)) permits carriers to provide free and reduced-rate overseas and foreign air transportation to employees of its affiliates. As indicated above, however, it does not authorize free or reduced-rate *interstate* transportation for such persons.

Mr. Lloyd Edward Tooks (2)

I trust this is responsive to your request. As I am sure you understand, the views expressed herein are solely those of the General Counsel and are not bindig upon the Board.

Sincerely,

James C. Schultz
General Counsel

Enclosure

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 22nd day of March, 1972

Application of WORLD AIRWAYS, INC. for exemption pursuant to section 416(b) of the Act	Docket 23654

ORDER DENYING APPLICATION

By application filed July 23, 1971, World Airways, Inc. (World), requests exemption from section 403(b) of the Federal Aviation Act of 1958 to permit World and other air carriers to provide free or reduced-rate interstate or domestic transportation to the employees of World Air Center (WAC); a wholly-owned subsidiary of World, and members of their families; and World requests special authority pursuant to section 223.8 of the Economic Regulations or a waiver of section 223.1 of the Economic Regulations to permit World and other air carriers to provide free or reduced-rate overseas or foreign transportation to the employees of WAC and members of their families.[1] An answer in support of World's application was filed on August 23, 1971, by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT).[2]

---

[1] We are treating World's request for special authority under section 223.8 as a request for exemption pursuant to section 416(b) of the Act. To some extent, Part 223 by its terms does not apply to supplemental air carriers, which are not authorized to provide individually ticketed transportation and must obtain the consent of the charterer to utilize charter space.

[2] The answer of IBT was accompanied by a motion to file such document out of time.

In support of its application for an exemption to provide free or reduced-rate interstate or domestic transportation to the employees of WAC and their families, World alleges that (a) WAC provides maintenance services to World, (b) WAC was split off from World in 1964 for corporate and financial reasons, and (c) circumstances of the relationship between World and WAC should not bar the employees of WAC from benefits available to the employees of World. In support of its application to provide free or reduced-rate overseas or foreign transportation to the employees of WAC or their families, World alleges that (a) WAC is an "affiliate" as defined in section 223.1 of the Economic Regulations except that the activities of World and WAC are not devoted to scheduled air transportation as required by section 223.1(b)(2), and (b) the employees of affiliates of suppllemental air carriers are entitled to the same privileges as the employees of affiliates of scheduled air carriers. The answer filed by IBT repeats most of the contentions made by World.

Upon consideration of all the facts before us, we have determined to deny World's application.

Section 403(b) of the Act does not provide for the issuance or interchange of passes for free or reduced-rate transportation for employees of affiliates of air carriers, and the Board has not extended the privilege to such persons by exemption.[3] However, pursuant to the provision of section 403(b) which authorizes the Board to issue regulations permitting free or reduced-rate transportation to other persons in overseas and foreign air transportation, the Board has adopted section 223.2(b)(1) of the Regulations which permits a scheduled carrier to provide free or reduced-rate overseas or foreign air transportation to employees of its own affiliates. It does not authorize free or reduced-rate interstate transportation for such persons, nor does it permit interchange of passes for transportation by carriers other than the affiliated carrier.

World has not presented any persuasive reason why it should be authorized to issue or interchange passes for interstate transportation to the employees of its affiliate. As indicated previously, such authority is not now granted to scheduled air carriers. The fact that World has chosen for its own benefit to organize a separate corporate entity for

[3] Pursuant to section 403(b) of the Act and Part 223 and section 208.7 of the Regulations, air carriers, foreign air carriers, and supplemental air carriers may issue and interchange passes for interstate, overseas, and foreign air transportation of carrier employees.

purposes of providing maintenance to World does not warrant expansion of the scope of free and reduced-rate transportation privileges.

On the other hand, World's contention that the employees of affiliates of supplemental carriers should be accorded the same privilege as employees of affiliates of scheduled carriers in overseas and foreign air transportation may be well taken, subject to the restrictions of the operating authority of the supplementals. However, in our judgment, this issue cannot be properly disposed of on the basis of an individual carrier's application for exemption. World has not alleged any special circumstances warranting use of our special exemption powers in behalf of that carrier alone. We will, however, issue a notice of rulemaking proposing to permit supplemental air carriers to utilize unused space in overseas and foreign air transportation to transport employees of their own affiliates, subject to the consent of the charterers in each case. This procedure will allow us to have the benefit of comments on the proposal by all interested persons before we reach a final decision on the merits.

Under the circumstances, the Board does not find that the enforcement of section 403 of the Act would be an undue burden upon World because of the limited extent of, or unusual circumstances affecting, the operations of World and is not in the public interest.

Accordingly, pursuant to the Federal Aviation Act of 1958, and particularly 416(b) thereof,

IT IS ORDERED THAT:

1. The application of World Airways, Inc., in Docket 23654 is hereby denied.

2. The motion of the Airline Division, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to file an answer out of time is granted.

By the Civil Aeronautics Board:

HARRY J. ZINK

Secretary

G-1

August 10, 1976

Mr. Richard Neel B-65
Attorney
American Airlines, Inc.
633 Third Avenue
New York, New York 10017

Dear Mr. Neel:

We have enclosed a letter from Mr. E.W. Buffum of the Service Employees International Union requesting pass privileges for employees of Security '76' on the same basis that Sky Chef employees are receiving such privileges, i.e., both are subsidiaries of American Airlines.

In order that we may accurately respond to Mr. Buffum's requst, please advise us with respect to American Airlines' corporate relationship with Security '76' and Sky Chef. Are they both totally owned subsidiaries of American? If so, please advise whether they qualify as American's "affiliates" in accordance with Part 223.1 the Board's Economic Regulations, and the reason(s) they do or do not qualify.

Further, we would appreciate your furnishing us the basis for including Sky Chef in the definition of *Company* in your free and reduced-rate manual. It would appear Sky Chef employees are receiving the same pass benefits as American Airlines' employees; however, if Sky Chef qualifies only as an "affiliate" of American then pass privileges for Sky Chef personnel must be restricted as required by Part 223.2(b)(1).

We look forward to your early reply.

Very truly yours,

James W. Greene
Chief, Tariffs Section
Bureau of Economics

JWGreene/LSKeller/sh/3/10/76

Enclosure
cc: B-25
B-63
B-65

September 21, 1976

Mr. Richard A. Lempert
Vice President and General Counsel
American Airlines, Inc.
633 Third Avenue
New York, New York 10017

Dear Mr. Lempert:

This is in response to your September 7, 1976 reply to our August 10 letter to Mr. Richard Neel, regarding pass privileges for the employees of Security '76' and Sky Chef.

We fully agree that the provisions of the Federal Aviation Act are permissive with respect to pass privileges for airline employees, and tht it is American's choice whether to extend pass privileges to such persons. However, American must not extend pass privileges to Security '76' employees or the employees of any other American subsidiary, unless such subsidiary qualifies as an affiliate of American in accordance with Part 223.2(b)(1) of the Board's Economic Regulations. Further, employees of subsidiaries can only be given free and reduced rate *overseas* and *foreign* air transportation.

We disagree with your representation that Sky Chef employees can be considered employees of American because Sky Chef's services are "regarded as an integral part of American's flight operations." Such a relationship in and of itself would not in our view obviate the subsidiary relationship and put Sky Chef employees on an equal footing with American employees for the purpose of qualifying for pass privileges under section 403(b) of the Act. Contrary to your representation, corporate structure does make a difference with respect to eligibility for pass privileges. We refer you to Order 72-3-76 which deals specifically with this subject. Unless Sky Chef employees are legally American employees, American is in violation of the Act when it offers interstate pass privileges to Sky Chef employees.

Very truly yours,

James W. Greene
Chief, Tariffs Section
Bureau of Economics

JWGreene/LSKeller/sh/9/16/76

§ 223.1 Definitions. As used in this part, unless the context otherwise requires—

An "affiliate" of a carrier means a person—

(1) Who controls such carrier, or is controlled by such carrier or by another person who controls or is controlled by such carrier, and

(2) Whose principal business in purpose or in fact is:

(i) The holding of stock in one or more carriers, or

(ii) Transportation by air or the sale of tickets therefor, or

(iii) The operation of one or more airports, one or more of which are used by such carrier or by another carrier who controls or is controlled by such carrier or who is under common control with such carrier by another person, or

(iv) Activities devoted to the transportation by air conducted by such carrier or by another carrier which controls or is controlled by such carrier or which is under common control with such carrier by another person.

"Air carrier" means the holder of a certificate of public convenience and necessity issued pursuant to section 401 of the Act.

"Carrier" means: (1) An air carrier or (2) a foreign air carrier which holds a permit issued under section 402 of the Act.

"Control," within the meaning of this section, means the beneficial ownership of more than 40 per cent of outstanding voting capital stock unless, as to the specific case, the Board shall have determined in a proceeding pursuant to section 408 of the Act that control does not exist; such control may be direct or by or through one or more intermediate subsidiaries likewise controlled of more than 40 per cent of outstanding voting capital stock.

"Domestic group familiarization tour" means a tour organized and controlled by one or more air carriers for the purpose of promoting the sale of air transportation by familiarizing a group of travel agents with tourist attractions, accommodations, and recreational facilities in a particular area within the 50 States, the District of Columbia, Puerto

Rico, the Virgin Islands, American Samoa, Guam, or the Trust Territory of the Pacific Islands.

"Free transportation" means the carriage by a carrier of any person or property (other than property owned by such carrier) in air transportation without compensation therefor; "reduced-rate transportation" means such carriage for a compensation less than that under the rate, fare, or charge published in the tariffs of such carrier, on file with the Board and otherwise applicable to such carriage.

"Pass" means a written authorization issued by a carrier for free or reduced-rate transportation of persons or property; "term pass" means such an authorization effective for a designated period, not to exceed three years; "trip pass" means such an authorization for a single one-way trip or round trip (whether the return trip is made via the same route as the outbound trip or a different one) between desiganted points.

"Travel agent" means a person (1) who is employed full time in a travel agency, (2) who has been in the continuous employment of such agency at least 12 months, and (3) who devotes his employment time in the agency primarily to the promotion and sale of transportation and related services.

§ 223.2 Persons to whom free and reduced-rate transportation may be furnished. In addition to the persons specified in subparts B and C of this part:

(a) Any carrier may provide free or reduced-rate transportation to any or all classes of persons specifically mentioned in section 403(b) of the Act;

(b) Any carrier engaged in overseas or foreign air transportation may provide free or reduced-rate overseas or foreign air transportation to:

(1) Directors, officers, and employees and members of their immediate families, of any affiliate of such carrier, the name of which affiliate currently is included in the list of affiliates filed by such carrier pursuant to § 223.7;

(2) Directors, officers, and employees and members of their immediate families, of any person operating as a common carrier by air, or in the carriage of mail by air, or conducting transportation by air, in a foreign country; and

(3) Other persons to whom such carrier is required to furnish free or reduced-rate transportation by law or government directive or by a contract or agreement, now or hereafter in effect, between such carrier and the government of any country served by such carrier, but only to the extent so required and only if such contract or agreement is filed with the Board and if the provisions thereof relating to such transportation are not disapproved by the Board as being contrary to the public interest: *Provided, however*, That the foregoing provision shall not be applicable to free or reduced-rate overseas or foreign air transportation pursuant to a law or government directive that requires the furnishing of such transportation to the general public or any segment thereof, and that the Board may without prior notice direct the carrier to file a tariff covering such transportation if the Board finds that the law or government directive in question requires the provision of such transportation.

(c) Any carrier authorized to carry persons in overseas or foreign air transportation may provide such authorized transportation free of charge to bona fide technical representatives of companies which have been engaged in the manufacture and/or development and/or testing of a particular type of aircraft or aircraft equipment, on condition that:

(1) Such transportation is for purposes of technical in-flight observation of such aircraft or equipment necessary in the interest of safety and/or improved efficiency and reliability of the operation of such aircraft or equipment;

(2) Such transportation is provided only when such representatives are engaged in specific technical in-flight observation of the carrier's aircraft or equipment or is provided by the same carrier for the purpose of necessary transit incidental to such duty; and

(3) Such transportation is reported in a statement addressed to the attention of the Bureau of Economics, Civil Aeronautics Board, Washington, D. C. 20428, and forwarded so as to be received by the Board within ten (10) days after the end of the calendar month in which such transportation took place. Such statement shall list the name of each person provided such free transportation, his company affiliation, the specific nature of the observations made, the particular equipment or component of the aircraft observed, the reasons in-flight observation was deemed necessary, and the dates, flights and points between which such free transportation was provided.

No. 80-1063

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. MONTGOMERY, *Petitioner*

vs.

AMERICAN AIRLINES, INC., *Respondent*

Brief of American Airlines, Inc., In Opposition

DONALD D. CONNORS, JR.
JAMES L. MEEDER

Attorneys for Respondent American Airlines, Inc.

Of Counsel:

BROBECK, PHLEGER & HARRISON
Spear Street Tower
One Market Plaza
San Francisco, CA 94105
(415) 442-0900

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

STATEMENT OF ISSUE PRESENTED

Does petitioner have an implied private right of action under Sections 403(b) or 404(b) of the Federal Aviation Act against an air carrier for damages in an amount equal to the difference between the then effective tariff rate he paid for air passage and the free or reduced rate furnished to employees paid by a wholly-owned subsidiary of an air carrier?

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No. 80-1063

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. MONTGOMERY, *Petitioner*

vs.

AMERICAN AIRLINES, INC., *Respondent*

Brief of American Airlines, Inc., In Opposition

STATEMENT OF THE CASE

On September 15, 1977, petitioner James A. Montgomery filed in the United States District Court for the Southern District of California a class action on behalf of himself and all individuals who purchased scheduled domestic air transportation from American Airlines, Inc. (American) during the preceding two years. Montgomery's action asserted that American's thirty-nine year old practice of granting free and reduced rate transportation to employees of a wholly-owned subsidiary, Sky Chefs, a division of Flagship International Inc.,[1] violated Sections 403(b) and 404(b) of the Federal Aviation Act (Act), 49 U.S.C. §§ 1373(b) and 1374(b), and regulations promulgated thereunder by the Civil

1. Flagship International, Inc., is a wholly-owned subsidiary of American. Sky Chefs is a division of Flagship and is in the business of airline catering; it prepares all meals for American's passenger flights as well as for over thirty other airlines.

Aeronautics Board (Board), 14 CFR ¶¶ 223.1, *et seq.* Petitioner prayed for two billion dollars ($2,000,000,000.00) in damages calculated as the difference between the fares paid by all of American's air passengers for a two-year period and the free or reduced rates granted to American's subsidiary employees. In effect, petitioner sought a refund of all fares paid by American's passengers from September 15, 1975 to September 15, 1977. (See Ninth Circuit Opinion below, Appendix A-2 to Petition.)

On March 3, 1978, American filed a motion to dismiss and for summary judgment. That motion was in some part dictated by prior events; an understanding of those events is necessary to an understanding of American's defenses in this matter and the inappropriateness of certiorari.

At all times pertinent hereto, petitioner was by occupation a Skycap. He worked at the San Francisco International Airport for an independent contractor called Allied Aviation Maintenance Service Company of California. Much, and perhaps most of his duties, by assignment of his employer, consist of attending to passengers of American. Petitioner is also the founder and long-time president of an organization of Skycaps known as NASCAP.[2]

On September 19, 1974, Mr. Montgomery by letter to American demanded that American grant pass privileges to Skycaps not employed by American. He asserted that, albeit he and the members of his organization were employed by independent contractors under contract with American and other air carriers, they were nevertheless *employees* of American because they performed the same services performed by other Skycaps directly employed

---

2. NASCAP is an acronym for the National Association of Skycaps, Incorporated. Skycaps, of course, are persons engaged in handling, checking and overseeing baggage and property of airline passengers at air terminals. Some of the Skycaps serving American's passengers are employees of American; others are employed by independent contractors; and yet others are employees of a wholly-owned subsidiary of American.

by American at other air terminals. (C.R. 117)[3] Thus, he reasoned, as employees of American, they were entitled as a matter of right to the same pass privileges granted other employees.[4]

American responded to the letter and stated that it could not issue passes because the Federal Aviation Act did not permit the issuance of passes to employees of independent contractors.

As a direct result of American's response to petitioner's request for passes (and some two years before the filing of the present action), the action of *NASCAP, Inc. v. American Airlines, Inc.*, No. CV-75-2872-HP, was filed on August 26, 1975 in the United States District Court for the Central District of California. In *NASCAP*, petitioner asserted that American's refusal to grant passes to members of his organization was "unjust discrimination" in violation of Section 404(b) of the Act, 49 U.S.C. § 1374(b). That action sought passes for NASCAP's members and $1,000,000 in damages. (C.R. 41-52).

On April 12, 1977, Judge Harry Pregerson of the Central District dismissed the *NASCAP* action on the ground that primary jurisdiction rested with the Civil Aeronautics Board. In dismissing the NASCAP action, Judge Pregerson noted that:

> It now appears to the Court *that NASCAP is challenging the fairness of American's decision to grant free or reduced-rate transportation only to workers paid by certain enumerated subsidiary corporate entities, while refusing to grant*

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3. "C.R. ...." refers to the Clerk's Record which was before the Ninth Circuit when it heard the matter below. All emphasis is added unless otherwise indicated.

4. The "pass privileges" sought by Mr. Montgomery were those passes that American grants to employees for free and reduced-rate air transportation as permitted by Section 403(b) of the Federal Aviation Act and regulations promulgated thereunder, 14 CFR 223.1, *et seq.* American has on file with the CAB its regulations governing entitlement to passes. (C.R. 55-58). These regulations specifically provide for the granting of passes to employees paid by certain subsidiary corporate entities, and have so provided for the past 39 years. (American's Regulations, C.R. 55-58; American Airlines' Answers to Interrogatory No. 5(a), C.R. 15-16).

> *such special rates to workers paid by other entities even though those workers also perform services for American.* A claim of discrimination based on the contents of an airline regulation is clearly subject to the doctrine of primary jurisdiction and should be heard by the Civil Aeronautics Board. *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.,* 237 U.S. 121, 131-132 (1915). A private right of action in the courts exists only to challenge the discriminatory application or enforcement of an airline's tariffs or regulations. (C.R. 61).

No appeal was taken from Judge Pregerson's order of dismissal.

On April 29, 1977 shortly after the dismissal of the *NASCAP* action, the action of *Complaining Skycaps v. American Airlines, Inc.,* CAB Docket No. 30881, was filed with the Civil Aeronautics Board ("Board") by the attorney who acted for petitioner in the present action and in the *NASCAP* litigation. The Board action also alleged unjust discrimination in violation of Section 404(b) of the Act.

As did the *NASCAP* action, the *Complaining Skycaps* action sought a declaration that petitioner and his fellow Skycaps were employees of American and that denial of passes to them was unjust discrimination in violation of Section 404(b) of the Act.

On January 6, 1978, judgment was entered by the Board dismissing the action on the grounds that:

> American's policy is apparently to treat free or reduced-rate transportation for employees as a fringe benefit which is sometimes subject to negotiations between American and its unions. Obviously it is not unusual for an employer to grant a particular fringe benefit to some employees and not to others. American may be wrong in its assertion that the Complaining Skycaps are not employees. Even if that is the case, however, the Complaining Skycaps are employed under different circumstances than those skycaps who are directly on American's payroll and, accordingly, American's decision

> to grant privileges to one group and not the other is not capricious. *The Complaining Skycaps' disagreement with American is a private labor dispute over a fringe benefit and is not an unjust discrimination cognizable under the Act.* (C.R. 72, 77).

No appeal was taken from the Board's dismissal.

While the *Complaining Skycaps* action was still pending, petitioner apparently conceived the idea of the present litigation.

On the morning of August 25, 1977, petitioner took a round-trip flight on an American Airlines plane between San Diego and Los Angeles to establish his "case and controversy". To quote from his deposition:

> Q. And what was the purpose of that flight?
>
> A. Well, the purpose of the flight was to substantiate my travel on American Airlines, so that I could be a representative for myself and also anyone else that I have flown American Airlines in the last two years. (Montgomery Deposition, p. 28, lns. 21-25).

This contrived flight was then used by petitioner as the basis for his present action.

It was on these facts that American filed its motion to dismiss and for summary judgment on March 3, 1978. American asserted in its motion that (1) petitioner had no implied right of action under Sections 403(b) and 404(b) of the Act, (2) the actions of *NASCAP, Inc. v. American Airlines, Inc.*, No. CV-75-2872-HP (C.D. Cal., April 12, 1977), and *Complaining Skycaps v. American Airlines, Inc.*, CAB No. 30881 (C.A.B., Wash., D.C., January 6, 1978) barred the present action under the doctrine of *res judicata*, and (3) petitioner was judicially estopped from bringing the present action by the inconsistent position taken in this action and the *NASCAP* and Complaining Skycaps actions.

In response to American's motion and without ever having moved under Rule 23 for class certification, petitioner filed a cross-motion for summary judgment on April 10, 1978.

On May 23, 1978 American's motion for summary judgment was granted for two independent reasons: (1) Mr. Montgomery has no implied right of action under Sections 403(b) and 404(b) of the Act and thus the complaint failed to state a claim upon which relief could be granted and (2) the earlier *NASCAP* action and *Complaining Skycaps* action were *res judicata* to the present action. (See Appendix B to Petition). An appeal followed. The Ninth Circuit affirmed the judgment of the District Court solely on the grounds that the complaint failed to state a claim upon which relief could be granted. The Ninth Circuit did not reach the question of *res judicata.* (Appendix A and C to Petition.)

REASONS FOR DENYING THE WRIT

A. The Decision Below Does Not Conflict With United States v. Western Pacific Railroad Co., 352 U.S. 59 (1956), or Klicker v. Northwest Airlines, Inc., 563 F.2d 1310 (9th Cir. 1977); The Facts of Each Case Are Unique.

Respondent has no quarrel with the general proposition that

> "Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the facts underlying it."

United States v. Western Pacific Railroad Co., 352 U.S. 59, 69 (1956); *Klicker v. Northwest Airlines, Inc.,* 563 F.2d 1310, 1312-13 (9th Cir. 1977).

But, the mere existence of this general legal principle does not create that "real and embarrassing conflict of opinion and authority between the circuit courts of appeal," which compels the granting of certiorari. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955), *quoting Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

No conflict between the Ninth Circuit's decision below, *Western Pacific, supra,* and *Klicker, supra,* appears on the face of those decisions, or in fact exists. Petitioner has simply attempted to create that conflict by asserting that "the CAB has previously decided the underlying substantive issue in this case" (Petition, p. 15). Petitioner would have this Court believe that the "opinion letter" written to *him* by the Board's general counsel is somehow the opinion of the Board, that the Board's order with regard to World Airways' application is dispositive and that correspondence between counsel at the Board's tariff section and American somehow operates as a decision of the Board. Nothing could more inaccurately characterize the record.

We have but three brief points.

First, on June 16, 1977 counsel for petitioner wrote the Board requesting an opinion as to whether an air carrier is permitted to grant pass privileges for free and reduced-rate interstate air transportation to employees of a wholly-owned subsidiary. (C.R. 123)

The General Counsel to the Board responded to counsel for petitioner by letter dated July 16, 1977 (Appendix E-1 to Petition). It is *this* letter which petitioner extensively quoted on page 5 of his Petition and has characterized as an "opinion letter confirming" the limitation on the authority of an air carrier to grant free or reduced-rate domestic air transportation. Petitioner failed to bring to the attention of the Court the closing paragraph of that letter:

> I trust this is responsive to your request. As I am sure you understand, the views expressed herein are solely those of the General Counsel and are not binding upon the Board.

(Appendix E-2 to Petition).

Second, petitioner asserts that the Board's order in *Application of World Airways, Inc.,* CAB Order 72-3-76, (Appendix F to Petition), resolves the "substantive issue in this case" (Petition, p. 10)

How, we ask, can such an order be dispositive of the question as to American when the Board rejected World's application in part because

> "World has not alleged any special circumstances warranting use of our special exemption powers in behalf of that carrier alone."
>
> * * *
>
> "Under the circumstances, the Board does not find that the enforcement of section 403 of the Act would be an undue burden upon World because of the limited extent of, or unusual circumstances affecting, the operation of World. . . ."

(Appendix F-3 to Petition). The answer is clearly that the Board's order resolves nothing as to American's 39 year old practice.

Third, although petitioner attempts to make much of the fact that there has been correspondence between counsel for the tariff section of the Board and American concerning this issue, he has failed to set forth that correspondence in the context in which it occurred.

In response to the letter from James W. Greene, Chief, Tariffs Section, Bureau of Economics, Civil Aeronautics Board, inquiring about American's practice of granting passes to employees of Sky Chefs, General Counsel for American stated on September 7, 1976:

> "American has provided free and reduced rate air transportation to the employees of Sky Chefs since that company was formed in 1942. Because of its relationship to American, Sky Chef's in-flight catering services have been regarded as an integral part of American's flight operations. For this reason, American has always been of the opinion that Sky Chef's employees could properly be deemed employees of American for purposes of qualifying for pass privileges under Section 403(b). Other airlines provide services identical to those supplied by Sky Chefs through catering departments

> which are part of the airline's corporate structure. Those employees receive pass privileges. It would be neither logical nor equitable to treat differently the employees of other airlines and those of Sky Chefs who do precisely the same type of work solely because of the type of corporate structure adopted by their respective employers."

(C.R. 200)

Mr. Greene responded to this letter on September 21, 1976 stating in part that:

> "We disagree with your representation that Sky Chef employees can be considered employees of American because Sky Chef's services are 'regarded as an integral part of American's flight operations.' Such a relationship in and of itself would not in our view obviate the subsidiary relationship and put Sky Chefs employees on an equal footing with American employees for the purposes of qualifying for pass privileges under section 403(b) of the Act."

(C.R. 161)

This "disagreement of counsel" is the extent to which the Board and American have explored the issue.

In short, the decision below is not in conflict with *Klicker* or *Western Pacific* because *the Board,* contrary to petitioner's assertion, has not decided the issue nor constructed American's regulations.

In *Western Pacific,* the Court stated in plain language that there would be no need to refer a matter of construction to an agency "if *that body,* in prior releases or opinions, had already construed the particular tariff at issue. . . ." 352 U.S. at 69. In *Klicker,* the court also stated in plain language that deference to an administrative agency is unnecessary "when *the agency* has already said what it thinks about this exculpatory tariff." 563 F.2d at 1313.

But, even if *the Board* passed negatively upon American's practice, petitioner still would be out of Court for there is simply no implied right of action.

B. The Ninth Circuit's Decision Is in Full Accord With Touche Ross v. Redington, Cannon v. University of Chicago, Cort v. Ash and the Lower Court Cases That Have Construed Sections 403(b) and 404(b) of the Federal Aviation Act.

In refusing to imply a private action under Sections 403(b) and 404(b) of the Act, the Ninth Circuit applied the four factor *Cort* analysis. (Appendix A-4 and 5 to Petition). In applying this analysis, the Ninth Circuit found that Section 404(b) did not proscribe the conduct complained of as unlawful and did not, by its terms, grant a private remedy for violation of Section 403(b) to any identifiable class, citing *Touche Ross v. Redington,* 442 U.S. 560, 576 (1979). (Appendix C-2 to Petition). It further found that

> "Difficulties arise when considering whether the harm complained of is of the type intended to be protected against under Section 404(b) of the Federal Aviation Act, and whether a private remedy in this special situation is consistent with legislative goals."

(Appendix A-5 to Petition).

The Ninth Circuit's decision is in full accord with the Court's recent decisions on implied statutory causes of action which have all stressed that the dispositive question is whether Congress *intended* to create the remedy sought and the starting point is always the statute itself. *Touche Ross, supra,* 442 U.S. at 568; *Cannon v. University of Chicago,* 441 U.S. 677, 688 (1979); *Transamerica Mortgage Advisors v. Lewis,* 444 U.S. 11, 16 (1979); *Cort v. Ash,* 422 U.S. 66 (1975).

Section 403(b) of the Act, 49 U.S.C. § 1373(b), specifically provides that the *Board* shall establish the ground rules for the granting of passes by air carriers:

> "Nothing in this chapter shall prohibit such air carriers or foreign air carriers, *under such terms and conditions as the Board may prescribe,* from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees. . . ."

And, Section 1007(a) of the Act, 49 U.S.C. § 1487(a), provides for *Board enforcement* of all statutory provisions and regulations by injunctive relief and for private enforcement by injunctive relief only for Section 401(a) of the Act, 49 U.S.C. § 1371(a). To quote the statute:

> "If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder . . . the Board or Administrator as the case may be their duly authorized agents, or, in the case of a violation of section 1514 of this title, the Attorney General, or, in the case of a violation of section 1371(a) of this title, any party in interest, may apply to the district court of the United States . . . for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, . . . from further violation of such provisions of this chapter. . . ."

In other words, the Act *itself* creates a Board cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances. This is exactly the situation which led the Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974) (*Amtrak*), to refuse to imply a private action:

> "Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim [*expressio unius est exclusio alterus*] would clearly compel the conclusion that the remedies created in § 307(a) [here § 1487(a)] are the exclusive means to enforce the duties and obligations imposed by the Act."

Accord, Lewis, supra, 444 U.S. at 20.

The legislative history of Section 403(b) only confirms this conclusion. While the legislative history of the original enactment

of Sections 403(b) and 404(b) is silent, the legislative history of the 1960 amendments to Section 403(b) is not. That history evinces a Congressional intent to *limit* enforcement of Section 403(b) to the Board.

In 1958 the CAB sought to have Section 403(b) amended so as to permit passes for certain additional persons not then specifically mentioned in Section 403(b). H.R. 4049, 86th Cong., 2nd Sess., enacted July 12, 1960, Pub.L. 86-627, 74 Stat. 445. The House Report on the amendment, H.R.REP. No. 517, 86th Cong., 1st Sess., 2, stated:

> "The proposed legislation is permissive. It would permit appropriate carrier action subject to *Board control.*"

And in S.REP. No. 1281, 86th Cong., 1st Sess. 1, *reprinted in* 1960 U.S. Code Cong. & Ad. News at 3058, the Senate Committee, in discussing the purpose of the proposed amendments, stated:

> "It is permissive and not mandatory and *the Board will retain control* over all conduct of the air carrier pursued thereunder."

The point is that the legislative history of Section 403(b) confirms the language of Section 1007(a) *limiting enforcement to the Board.*

There is at least one more very good reason why the Ninth Circuit's decision below is in full accord with the principles recently set forth in *Touche Ross, Cannon* and *Cort.* One of the essential inquiries under *Cort* is whether petitioner is of "one of the class for whose *especial* benefit the statute was enacted." 422 at 78. One of the elements of this inquiry, akin to standing, focuses on the *injury* or *harm* suffered by the plaintiff. This element was discussed in *Texas & Pacific Railway Co. v. Rigsby,* 241 U.S. 33, 39 (1916):[5]

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5. *Ringsby* was cited in *Cort,* supra, at 78, in its discussion of the especial benefit test.

> "A disregard of the command of the statute is a wrongful act, and *where it results in damage* to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . ."

In *Cannon,* the Court again recognized the obvious—*injury* or *harm* is a critical element:

> "As our recent cases—particularly *Cort v. Ash,* 422 U.S. 66—demonstrate, the fact that a federal statute has been violated and *some person harmed* does not automatically give rise to a private cause of action in favor of that person."

441 U.S. at 688.

It is undisputed that petitioner was charged, as was the general public, the *then effective tariff rate* for air transportation between San Diego and Los Angeles. And, Section 403(b) of the Act provides that:

> "No carrier . . . shall charge . . . a greater or less or different compensation for air transportation than the . . . fares . . . specified in *then current effective tariffs* of such air carrier. . . ."

Petitioner received exactly what Section 403(b) requires; he was charged the amount of the then effective tariff for his air passage. In other words, *he has suffered no injury* for he received all that he was entitled to under the law.

In *Wolf v. Trans World Airlines, Inc.,* 544 F.2d 134 (3rd Cir. 1976), *cert. denied* 430 U.S. 915, the court specifically found that a passenger does not have an implied right to action under Section *403(b)* because he suffers no injury so long as he is not charged *more* than the current tariff:

> "Plaintiffs here are not the special beneficiaries of § 403(b). That section prohibits the charging of fares either higher or lower than those established by the tariff. Yet a passenger

> could claim to be injured only by a higher charge. . . . But if a carrier specifically contracted with a group of passengers to furnish carriage and other services at a cost *below* the tariff rate, and then did so, the carrier . . . would violate the tariff. Yet surely the passenger, suffering no injury, would have no right of action under § 403(b)."

544 F.2d at 137.

The court in *Wolf* went on to find that § 403(b) does not protect a class of which plaintiffs are members:

> "Instead, it was designed to empower the CAB to control the supposedly pernicious competitive activities that were the target of the Federal Aviation Act."

Id.

Petitioner has responded by simply attempting to color his claimed violation of Section 403(b) as a violation of Section 404(b). He then asserts that *every* case similar to the present one involving an air passenger's claimed violation of Section 404(b) has implied cause of action. Such an approach cannot escape logic or the law. Both the Ninth Circuit and the District Court below quickly saw through this contention. The District Court put it this way:

> "If a violation of § 403(b) gives a plaintiff no right of action then that plaintiff should not be afforded a remedy by the device of alleging discrimination under § 404(b). In the case at bar, plaintiff is doing just that; he has turned what is really a charge of violating § 403(b) into a charge of discrimination under § 404(b). Surely the drafters of the Act did not contemplate a right of action under § 404(b) to resolve a problem for which they did not intend a private remedy under § 403(b)." (C.R. 218)

Indeed, the Board has taken the position that Sections 403(b) and 404(b) operate independently. In *Transcontinental Bus*

System, Inc. v. CAB, 383 F.2d 466, 481 (5th Cir. 1967), the Board took that position and the Fifth Circuit agreed:

> "We agree with the conclusion of the Board that 403(b) merely permits the granting of reduced-rate transportation to the classes of persons enumerated in the section without regard to whether such rates meet the requirements of § 404(b). . . ."

Apparently when Petitioner examined *every* case he over looked *Wolf, supra,* and *Polansky v. Trans World Airlines, Inc.,* 523 F.2d 332 (3rd Cir. 1975), both of which have refused to imply causes of action for *air passengers.* Petitioner has missed the point which is that:

> ". . . each new category of *conduct* alleged to violate [Section 403(b) or 404(b)] must be tested against the standards stated by the Supreme Court in *Cort v. Ash, supra.*"

Polansky, supra, at 335. The implication of a statutory cause of action does not turn solely upon the fact that the plaintiff is or was an air passenger.

If petitioner's view of the Act prevailed, every air passenger of American would obtain exemption from the "then current effective tariffs." They would obtain such an exemption by filing an action for damages calculated as the difference between the tariff rate they paid for air passage and the free or reduced-rate furnished by American to employees of its subsidiaries.

Such an approach is totally inconsistent with the underlying scheme of the Act. In giving each plaintiff air passenger "damages", the court would in effect be ordering American to refund or remit the valid tariff rates charged. Such an order collides squarely with the Section 403(b) proscription that

> ". . . no air carrier . . . shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or

facilities so specified [in the then currently effective tariffs of an air carrier.]"

To imply such a remedy would clearly sound a bell shifting regulation of air carrier practices under Section 403(b) from the Board to the federal courts and private litigators—a shift which is neither warranted, desirable nor in any way compatible with the regulatory scheme intended by Congress when it enacted the Federal Aviation Act. *Danna v. Air France,* 463 F.2d 407, 410 (2nd Cir. 1972). Indeed, the mischief sure to follow such a shift is impossible of comprehension.

In short, the Ninth Circuit's decision not to imply a private remedy under § 403(b) does not in any way conflict with the Court's holdings in *Touche Ross, Cannon* and *Cort.* And, certainly there does not exist that "real and embarrassing conflict of opinion and authority between the Courts" which compels the granting of certiorari. *Rice, supra, Western Well Works, supra.*

C. The Petition Does Not Raise An Important Unresolved Federal Question; the Dispute Between the Parties Is Unique to the Parties.

Petitioner argues that without the intervention of the Court an important question will go unresolved and he will continue to suffer harm because he was charged the then current tariff rate for his air passage.

Before petitioner filed the present action, the dispute between petitioner and American *was found* by the Board to be

". . . a private labor dispute over a fringe benefit and is not an unjust discrimination cognizable under the Act."

Complaining Skycaps v. American Airlines, Inc., CAB Docket No. 30881, decided January 6, 1978 (C.R. 61). It was that decision which petitioner did not appeal and it was that action which the district court found to bar the present action under the doctrine of *res judicata,* an issue the Ninth Circuit never reached. (See Ap-

pendix B-5 to Petition for the trial court's discussion of *res judicata.*) Thus, even if there were an implied right of action, petitioner's action is barred by the doctrine of *res judicata.* Such a case is hardly appropriate for the resolution of issues which petitioner would have this Court believe are unique, novel and important, which of course they are not.

CONCLUSION

For all the foregoing reasons the petition should be denied.

Respectfully submitted,

DONALD D. CONNORS, JR.
JAMES L. MEEDER
Attorneys for Respondent
American Airlines, Inc.

Of Counsel:

BROBECK, PHLEGER & HARRISON
Spear Street Tower
One Market Plaza
San Francisco, CA 94104
(415) 442-0900